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Attorneys for Defendants RADY CHILDREN'S HOSPITAL SAN DIEGO (erroneously sued as CHILDREN'S HOSPITAL) and DIANA CHASE, N.P.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CARMEN POWELL Plaintiff, v. CITY OF CHULA VISTA; CHULA VISTA POLICE DEPARTMENT; DET. RUTH HINZMAN; AGT. ANDERSON; AGT. OYOS; SGT. CERVANTES; AND PERSON ENTITIES UNKNOWN; COUNTY OF SAN DIEGO AND SAN DIEGO COUNTY PROTECTIVE SERVICES WORKERS; JULIE SMITH; NADIA NAJORS; MEGAN PETFINGER; REBECCA SLADE AND PERSONS AND ENTITIES UNKNOWN; CHILDREN'S HOSPITAL; DIANA CHASE, NURSE; DEBRA DAVIES, LCSW, Defendants.	Case No. 07 CV 1836 JAH (JMA) Honorable John A. Houston Courtroom 11 **DEFENDANTS', RADY CHILDREN'S HOSPITAL SAN DIEGO'S ERRONEOUSLY SUED HEREIN AS CHILDREN'S HOSPITAL, AND DIANA CHASE, N.P. NOTICE OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)** **Complaint Filed: September 19, 2007** Hearing Date: March 3, 2008 Hearing Time: 2:30 p.m.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on March 3, 2008 at 2:30 p.m. or as soon thereafter as the matter may be heard in the above entitled court, located at 880 Front Street, San Diego, CA 92101,

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Courtroom 11, the Honorable John A. Houstan, defendants RADY CHILDREN'S HOSPITAL SAN DIEGO (erroneously sued as CHILDREN'S HOSPITAL) (hereinafter "RCHSD"), and DIANA CHASE (hereinafter collectively "defendants"), will move to dismiss the entire action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted, and pursuant to California litigation privilege, Civil Code 47(b), which provides absolute, unequivocal immunity.

Plaintiff's complaint fails to make a claim which would subject moving defendants to liability and should be dismissed under FRCP 12(b)(6) for plaintiff's failure to state facts sufficient to constitute a cause of action for which relief can be granted.

MOTION TO DISMISS

Defendant RCHSD and defendant Diana Chase move to dismiss Plaintiff Carmen Powell's ("Plaintiff") Complaint as follows:

1. Dismiss the First Count

Defendants request a dismissal as to the First Count for deprivation of right to procedural due process, on the grounds that said cause of action fails to state facts sufficient to constitute a cause of action and fails to demonstrate how RCHSD or Ms. Chase were state actors. Additionally, defendants are absolutely immune from liability. (Federal Rule of Civil Procedure section 12(b)(6); California Civil Code 47(b) .)

2. Dismiss the Second Count

Defendants request a dismissal as to the Second Count for deprivation of rights in violation 18 U.S.C. section 242, on the grounds that said cause of action fails to state facts sufficient to constitute a cause of action and fails to demonstrate how RCHSD or Ms. Chase were state actors. Additionally, defendants are absolutely immune from liability. (Federal Rule of Civil Procedure section 12(b)(6); California Civil Code 47(b) .)

3. Dismiss the Third Count

Defendants request a dismissal as to the Second Count for deprivation of rights in violation 18 U.S.C. section 241, on the grounds that said cause of action fails to state facts sufficient to constitute a cause of action and fails to demonstrate how RCHSD or Ms. Chase were state actors. Additionally, defendants are absolutely immune from liability. (Federal Rule of Civil Procedure section 12(b)(6); California Civil Code 47(b) .)

This motion to dismiss is based upon this notice, the attached Memorandum of Points and Authorities, such oral argument as the Court may allow, and on all pleadings, papers, and records on file in this action.

Dated: January 18, 2008

LEWIS, BRISBOIS, BISGAARD & SMITH

by: /S/ Rita R. Kanno
Marilyn R. Moriarty
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CARMEN POWELL Plaintiff, v. CITY OF CHULA VISTA; CHULA VISTA POLICE DEPARTMENT; DET. RUTH HINZMAN; AGT. ANDERSON; AGT. OYOS; SGT. CERVANTES; AND PERSON ENTITIES UNKNOWN; COUNTY OF SAN DIEGO AND SAN DIEGO COUNTY PROTECTIVE SERVICES WORKERS; JULIE SMITH; NADIA NAJORS; MEGAN PETFINGER; REBECCA SLADE AND PERSONS AND ENTITIES UNKNOWN; CHILDREN'S HOSPITAL; DIANA CHASE, NURSE; DEBRA DAVIES, LCSW, Defendants.	Case No. 07 CV 1836 JAH (JMA) Honorable John A. Houston Courtroom 11 **DEFENDANTS RADY CHILDREN'S HOSPITAL SAN DIEGO'S (ERRONEOUSLY SUED AS CHILDREN'S HOSPITAL), AND DIANA CHASE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)** **Complaint Filed: September 19, 2007** Hearing Date: March 3, 2008 Hearing Time: 2:30 p.m.

Defendants RADY CHILDREN'S HOSPITAL SAN DIEGO (erroneously sued as CHILDREN'S HOSPITAL) (hereinafter "RCHSD"), and DIANA CHASE (hereinafter collectively "defendants") respectfully submit the following Memorandum of Points and

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Authorities in support of their Motion to Dismiss plaintiff's Complaint in its entirety, or causes of action therein, with prejudice.

I. INTRODUCTION

This action arises from the arrest of plaintiff CARMEN POWELL (hereinafter "plaintiff" or "Ms. Powell") after being investigated and accused of domestic violence and abuse. On September 19, 2007, plaintiff filed her complaint naming several defendants in the caption, including, but not limited to, Diana Chase ("Ms. Chase") and Rady Children's Hospital San Diego ("RCHSD") (erroneously sued herein as Children's Hospital) (collectively "defendants.") Plaintiff alleges misrepresentations and falsification of information by county social workers, county investigators, and police officers, resulted in the removal and placement of her children in foster homes. Although RCHSD and Ms. Chase are named as defendants in the caption, it is unclear as to whether plaintiff in fact intended to name them as defendants in this lawsuit. Plaintiff lists defendants named in this lawsuit and describes why each individual is named as a defendant. RCHSD and Ms. Chase are not included in this list. As such, these moving defendants move to dismiss the Complaint in its entirety, because the Complaint fails to put these defendants on notice of the allegations raised against them in this lawsuit. Assuming arguendo this court finds plaintiff appropriately named RCSDH and Ms. Chase as defendants in this lawsuit, due to the deficiencies described below, defendants submit this motion.

Plaintiff claims her estranged husband reported acts of domestic violence to the Chula Vista Police Department. Because the complaint is confusing and unintelligible it is difficult to decipher to the alleged chain of events. It is appears, Ms. Powell believes her husband also reported to police that she physically abused her children. Ms. Powell claims she was unlawfully investigated by Child Protective Services ("CPS") social workers. She contends CPS employees, Julie Smith, Nadia Najors, Megan Petfinger, and Rebecca Slade, each fabricated evidence, lied under oath during CPS hearings, and failed to conduct a thorough investigation. She further claims that based on these false allegations of child abuse, police unlawfully searched her home, unlawfully seized her child, and committed a false arrest. Ms. Powell believes her family was never in imminent danger, yet police officers entered her home, handcuffed her, and took her to jail. As a result, plaintiff alleges she has been deprived of her constitutional rights of due process and hearing.

The Court should dismiss the entire Complaint with prejudice as plaintiff cannot assert a claim against a private party, RCHSD and Ms. Chase, under the guise of 18 U.S.C. sections 241 and 242. Additionally, RCSDH and Ms. Chase are absolutely immune from civil liability under the California litigation privilege, Civil Code 47(b), which provides absolute, unequivocal immunity to mandated reporters of unlawful conduct.

Furthermore, it is obvious from the face of the Complaint, these issues have already been litigated and were the subject of state court dependency proceedings. As such, plaintiff is collaterally estopped from bringing this matter before the Federal Court. Accordingly, defendants asks the Court to dismiss plaintiff's entire Complaint without leave to amend.

II. STATEMENT OF FACTS

Plaintiff Carmen Powell was married to Laverne Wilkerson when allegations of abuse and domestic violence were raised against her. Ms. Powell claims these allegation arose shortly after she requested a divorce. (Complaint, page 3, paragraph 2.) Ms. Powell's husband told Chula Vista Police that she physically abused him and her children. (Complaint, page4, paragraph 4.)

Julie Smith, a social worker, investigated allegations of child abuse against Ms. Powell. Ms. Smith participated in an interview with Deborah Davies at RCHSD, wherein she substantiated abuse. However, Ms. Powell claims she watched this taped interview and discovered her daughter did not show signs of abuse, but instead begged for the comfort of her mother. Ms. Powell alleges Ms. Smith conspired with Ms. Davies to commit perjury and fabricate records in order to substantiate child abuse. (Page 2, paragraph 1.)

Another social worker, Nadia Najors, also investigated the allegations of abuse raised against Ms. Powell. Plaintiff contends Ms. Najors also committed perjury and failed to conduct a thorough investigation of the claims. She claims Ms. Najors intentionally misrepresented to the court Diana Chase's qualifications. Ms. Chase is a nurse practitioner employed by RCSDH. Ms. Powell claims that Ms. Najors testified that Ms. Chase is in fact a medical doctor who examined Ms. Powell's daughter for signs of abuse. (Page 2, paragraph 2.)

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Ms. Powell further contends Ms. Najors purposely withheld information regarding allegations of domestic violence. Plaintiff claims Ms. Najors admitted while in Ms. Powell's residence and in front of police officers, that there were no grounds for removal of plaintiff's children from her home. She contends that Ms. Najor thereafter perjured herself in court, testifying Ms. Powell's children were witnesses to domestic violence. (Page 3, paragraph 1.)

Social worker Mega Petfinger also conducted an investigation regarding the allegations of abuse raised against Ms. Powell. Plaintiff claims Ms. Petfinger also lied in court, fabricated documents, and falsified evidence. Ms. Powell was placed in the Child Abuse Index as a result of Ms. Petfinger's investigation. (Page 3, paragraph 2.) A county detective, Ruth Heinzman, also investigated the matter and confirmed abuse. (Page 4, paragraph 2.)

Senior social worker, Rebecca Slade, also became involved in Ms. Powell's case. Plaintiff contends Ms. Slade knowingly lied about her communications with her daughter's treating physician and in turn prevented plaintiff's daughter from receiving appropriate medical care. Ms. Powell claims that because her daughter was prevented from receiving medication, she experienced convulsions. She claims evidence of convulsions and seizures were also used in substantiating the claim of abuse against plaintiff. Ms. Powell believes these misrepresentations led to the isolation of her daughter from her family. Ms. Powell further claims Ms. Slade committed perjury and intentionally falsified reports provided by Ms. Chase. (Page 3, paragraph 3.)

Based on the above investigations, officer Anderson went to Ms. Powell's home with Ms. Najors and arrested Ms. Powell. (Page 4, paragraph 3.) She was taken to jail and held for four days. (Page 4, paragraph 4, page 5, paragraph 1.) Ms. Powell claims after her release she learned police officers unlawfully searched her home without a warrant. She further claims her children were unlawfully removed from her home, since there were no visible signs of injury to her children. (Page 4, paragraph 3.) As a result, Ms. Powell brings this lawsuit for violation of her constitutional rights, alleging county social workers lied under oath, county investigators lied under oath, police officers conducted an unlawful arrest, and the Judge who heard the underlying action violated her rights.

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III. ARGUMENT

A. Legal Standard on a Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure section 12(b)(6) a court may dismiss a Complaint for failure to state a claim upon which relief may be granted. Dismissal of a Complaint is proper when there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." (*Balistreri v. Pacific Police Dept.*, 901 F.2d 696,699 (9th Cir. 1990).) In reviewing a Rule 12(b)(6) motion, the Court must accept as true all material allegations in the Complaint. (*NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).) However, a court need not accept every allegation in a Complaint as true in considering its sufficiency. (*Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992).)

B. Plaintiff's Complaint is Unintelligible

The Complaint names fifteen defendants and alleges three counts. Although plaintiff purports to identify which causes of action are intended to be asserted against which defendants, examination of the allegations contained in the Complaint does not reveal what exactly is being alleged against RCHSD or Ms. Chase in a manner sufficient to put them on notice of what each allegedly did wrong. As such, plaintiff has not properly asserted claims against moving defendants. Furthermore, each cause of action ultimately rests on plaintiff's claim that CPS and Chula Vista Police Department violated her civil rights. All of the purported claims are inextricably intertwined with this issue. As is discussed below, plaintiff cannot assert a claim for police misconduct, or misconduct of county employees, against RCHSD or Ms. Chase pursuant to 18 U.S.C. sections 241 and 242, because RCHSD is a private hospital and Ms. Chase is a private individual, not acting under color of state law.

C. The Court Should Dismiss the First Claim for Violation of First and Fourteenth Amendment Due Process With Prejudice Because RCHSD and Ms. Chase are Absolutely Immune From Liability

If each of plaintiff's claims are based on the allegation that RCHSD and Ms. Chase and conspired with co-defendant social workers to falsify reports and commit perjury, and this was discovered during testimony provided at the CPS hearings, said communications are absolutely protected from litigation and cannot be the basis of this lawsuit.

The litigation privilege protects communication "in any (1) legislative proceeding (2) judicial proceeding or (3) in any other official proceeding authorized by law...." (*California Civil Code* section 47(b).) The principle purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the Courts or other official proceedings authorized by law, without the fear of being harassed subsequently by derivative tort actions. (*Morales v. Cooperative of American Physicians, Inc.* (1999) 180 F.3d 1060, 1062.) This privilege is applied expansively in California, including in regard to communications with law enforcement personnel to report suspected criminal activity. (*Hagberg v. Cal. Fed. Bank FSB*, 32 Cal.4th 350, 360 (2000).) In *Hagberg*, the Court held that a report to the police that plaintiff attempted to cash a fraudulent check was protected by the absolute privilege under section 47(b), even though the bank's report to the police later turned out to be false. (*Id.* at 356, 375.)

Accordingly, section 47(b) confers an absolute privilege that bars all tort claims based upon communications to government officials, with the exception of malicious prosecution. (*Hagberg* 32 Cal.4th at 375.) Here, all of plaintiff's claims are based on the purported communications to the CPS social workers and Chula Vista Police Department, and the ensuing arrest. Since alleged communications by RCHSD personnel were made after allegations of abuse against plaintiff and after CPS became involved, said communications are afforded an absolute privilege. Plaintiff specifically references the testimony of defendants Smith, Najors, Petfinger, at Child Protective Services hearings following plaintiff's arrest. (Complaint.) The Complaint also references interviews, examinations and reports conducted by RCHSD personnel, that were used during these hearings. (Complaint, page 2, paragraphs 1 and 2, page 3, paragraph 3.) Communications between RCHSD personnel and county investigators or police officers are absolutely privileged. As recognized in *Hagberg*, this absolute privilege is extended to communications to government officials where it is intended to trigger an investigation into ***possible*** criminal activity. Therefore, none of these communications can constitute the basis for any of the tort actions alleged by plaintiff.

Said communications took place in anticipation of litigation, i.e. CPS hearing to remove plaintiff's children from the home. *California Civil Code* section 47(b) provides absolute

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immunity for "any communication made...in the initiation or course of any other proceeding authorized by law...."

These investigatory communications and the resulting hearings are proceedings that are authorized bylaw. Reports and testimony of defendants in a prior proceeding used in plaintiff's derivative action are absolutely prohibited. Therefore, none of these communications can constitute the basis for any of the tort actions alleged by plaintiff. The Court must dismiss plaintiff's Complaint without leave to amend.

D. The Court Should Dismiss the First Through Third Claims With Prejudice Because RCHSD and Ms. Chase are Private Parties, Not Acting Within the Color of the State

Federal statute, 18 U.S.C. sections 241 and 242, allow individuals to assert claims for violation of federal rights by government actors. In order to state a claim under 18 U.S.C. section 242, not only must plaintiff show that she was deprived of a constitutional right, but plaintiff must also demonstrate moving defendants acted under color of state law. Section 241 makes it unlawful for two or more persons to agree together to injure or intimidate a person in the free exercise of right or privilege. Individuals cannot bring a section 241 or 242 action against a private entity or individual who was not acting under the color of state law. (*Stapleton v. Superior Court* (1968) 70 Cal.2d 97, 101-102.) However, plaintiff can bring such a claim if it is shown that the private party had an agreement with the state to deprive plaintiff of her rights or willfully participated in a joint action with state officials in depriving plaintiff of her rights. (*Id.*)

Here, plaintiff fails to provide specific facts showing how Ms. Chase, a private nurse practitioner, performing services at Rady Children's Hospital San Diego, a private hospital, colluded with a state official to deprive plaintiff of her constitutional rights. In fact, in her Complaint plaintiff does not allege a single fact against Ms. Chase or RCHSD to demonstrate how they were acting under color of state law. Furthermore, plaintiff cites no authority to support her claims of violation of constitutional rights against moving defendants.

The Complaint is devoid of any facts establishing that Ms. Chase or RCHSD colluded with CPS or Chula Vista Police Department. Without specific facts establishing how, if at all, moving

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defendants may have been acting under the color of state law when examining plaintiff's child, plaintiff's First, Second and Third counts must be dismissed without leave to amend.

Furthermore, it is unclear from the face of the complaint whether plaintiff seeks damages from defendants. As has been well established, 18 U.S.C. sections 241 and 242 contain no provisions authorizing the award of damages. Instead, the statues were designed to criminal punish or penalize state actors for violations of rights of citizens. (*Sinchak v. Parente* 262 F.Supp. 79 (D.C.Pa 1966).) Therefore, if it is plaintiff's purpose by filing this lawsuit to seek monetary damages from moving defendants, counts two and three of the Complaint are inapplicable and must be dismissed.

V. CONCLUSION

Based upon the foregoing, each of plaintiff's Complaint against RCHSD and Ms. Chase must be dismissed without leave to amend.

Dated: January 18, 2008

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
880 FRONT STREET, SAN DIEGO, CALIFORNIA 92101

PLAINTIFF(S)PETITIONER(S) CARMEN POWELL

DEFENDANT(S)/RESPONDENT(S) CITY OF CHULA VISTA, et al.

CASE NUMBER:
07 CV 1836 JAH (JMA)

PROOF OF SERVICE

HONORABLE JOHN A. HOUSTON
COURTROOM 11

I, the undersigned, declare that: I am over the age of 18 years and not a party to the case; I am employed in, or am a resident of the County of San Diego, California, where the mailing occurs; and my business address is 550 West "C" Street, Suite 800, San Diego, California. On this date, January 18, 2008, I served documents via the United States District Court for the Southern District of California's Electronic Case Filing system described as follows:

1. **DEFENDANTS', RADY CHILDREN'S HOSPITAL SAN DIEGO'S (ERRONEOUSLY SUED HEREIN AS CHILDREN'S HOSPITAL), AND DIANA CHASE, N.P. NOTICE OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

2. **DEFENDANTS RADY CHILDREN'S HOSPITAL SAN DIEGO'S (ERRONEOUSLY SUED AS CHILDREN'S HOSPITAL), AND DIANA CHASE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

3. **NOTICE OF JOINDER AND JOINDER OF DEFENDANTS', RADY CHILDREN'S HOSPITAL SAN DIEGO'S ERRONEOUSLY SUED HEREIN AS CHILDREN'S HOSPITAL, AND DIANA CHASE, N.P. TO DEFENDANT JULIE SMITH'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

4. **DEMAND FOR JURY TRIAL**

on designated recipients (as currently maintained as of the date and time of this filing on the United States District Court for the Southern District of California's Electronic Case Filing system) through electronic transmission through the United States District Court for the Southern District of California's Electronic Case Filing system. Upon completion of said transmission of said documents, a certified receipt is issued to filing party acknowledging receipt by the United States District Court for the Southern District of California's Electronic Case Filing system. Once the United States District Court for the Southern District of California's Electronic Case

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[X] **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct and this document was printed on recycled paper.

Dated: January 18, 2008 ______________/s/______________

KATHIE RICHMOND